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Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-1430–09 OF 2015
ROHANA YUSUF, IDRUS HARLIN AND MARY LIM JJCA
16 JANUARY 2018

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Arbitration — Award — Setting aside — Arbitrator relied on his own 'extraneous evidence' (ie, evidence the parties had not adduced during arbitration) to decide his award — Whether rules of natural justice breached as parties to arbitration were denied opportunity to address, agree with or rebut 'extraneous evidence' — Whether award liable to be set aside under s 37(1)(b)(ii) read with s 37(2)(b) of the Arbitration Act 2005 ('the AA') — Whether High Court wrong to refuse to set aside award on ground applicant had not suffered actual or real prejudice as result of breaches of natural justice — Whether s 37 of the AA did not require prejudice suffered by applicant to be shown — Whether High Court wrongly imported requirement of 'prejudice' into s 37 of the AA from arbitration laws in Singapore or the UK — Factors court should consider when deciding whether or not to set aside arbitral award for breach of rules of natural justice under s 37 of the AA

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The appellant entered into an agreement with the respondent to hire the latter's pipe-laying barge. Disputes arose between the parties which were referred to arbitration. The major dispute was over who was responsible for damage to the stinger hitch of the vessel. The respondent said that the damage was caused by the appellant's negligence. The appellant denied liability and said there was a latent defect in the stinger hitch which was not apparent when the parties jointly inspected the barge at the commencement of the hire period. When the stinger hitch, which was a detachable mechanism, broke down during usage, the appellant welded it to the hull of the vessel thus causing a structural alteration to the vessel which the respondent had to undo and return the vessel to its original condition by carrying out repairs to the vessel in a dry dock. The respondent maintained that the appellant was liable to pay the hire charges during that repair period and to, inter alia, pay for the costs of the repairs and reinstatement of the vessel and of materials/equipment on board which had either been used by the appellant or was missing or damaged during the time the barge was in the appellant's possession. The arbitrator ruled that the appellant had to, inter alia, pay the respondent the cost of the repair/reinstatement of the vessel, all outstanding hire charges with interest and the costs of the reimbursable items. With regard to the damage to the stinger hitch, the arbitrator found from the evidence that there was no negligence on the appellant's part, nor was there latent damage in the stinger hitch at the

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commencement of the charter period and that the vessel was delivered to the appellant in a seaworthy condition. The arbitrator, however, concluded that, on balance of probabilities, the damage to the stinger hitch was caused by 'continuing operation of the stinger hitch and the vessel in severe weather conditions by the respondent (ie, the appellant here) prior to and on the day the damage was discovered'. In reaching that conclusion, the arbitrator relied on two pieces of 'extraneous evidence' (ie, evidence the parties had not adduced during the arbitration), namely: (a) that 'weather-induced erratic stress and loading had subjected the structural members of the stinger assembly to fatigue'; and (b) that 'continuous excessive loads accentuated by severe weather during the week resulted in the cracking of the plate which was one of the critical load bearing and load transfer members between the stinger hitch box and the hull of the vessel'. The arbitrator came to his conclusion 'even though the cause was not investigated through metallurgical or scientific methods of material analysis of the failed member (cracked plate) by the parties'. The appellant applied to the High Court to set aside the arbitral award under s 37(1)(a)(iv), 37(1)(b)(ii) and 37(2)(b) of the Arbitration Act 2005 ('the AA') and/or to set aside or vary the award under s 42 thereof. The appellant contended that by relying on the two pieces of extraneous evidence, the arbitrator had denied the appellant a reasonable opportunity of being heard on those pieces of evidence and that accordingly, there was a breach of the rules of natural justice which rendered the award liable to be set aside under the provisions of the AA. The respondent resisted the application arguing that the award should not be disturbed because even if there was a breach of the rules of natural justice, the appellant had not been prejudiced thereby. The High Court agreed with the respondent's submission and, relying on two decisions of the courts in Singapore, dismissed the appellant's application. The court held that even though the reliance on the two pieces of extraneous evidence had in fact breached the rules of natural justice by denying the parties of an opportunity to agree or disagree with that evidence, the appellant had not been thereby prejudiced and therefore the award should not be set aside. The instant appeal was against the High Court's decision.

Held, allowing the appeal and setting aside both the decision of the High Court and the arbitral award:

(1) While the High Court judge was correct to find that extraneous evidence was taken into account by the arbitrator in coming to his decision in violation of ss 20 and 37 of the AA, the judge erred when he applied the wrong principles and failed to exercise discretion to set aside the award (see para 96).

(2) Although the High Court judge had correctly ascertained and established that the arbitrator had breached the rules of natural justice by relying on the two pieces of 'extraneous evidence' that the arbitrator had himself raised without giving the parties an opportunity to test that evidence, the

judge erred when he went further to require that there had to be proof of actual or real prejudice suffered by the appellant before discretion to set aside the award could be exercised. This was despite the judge recognising that the position under ss 37(1)(b)(ii) and 37(2) of the AA was different from that under the Singapore and UK jurisdictions. The requirement that an arbitral award could only be set aside if the breach of natural justice had prejudiced or caused substantial injustice to the applicant was not found in s 37 of the AA although that might be a specific requirement of the arbitration laws in Singapore or the UK. The court should not import into the Malaysian arbitration or litigation regime an understanding or principle which was not provided for under the AA. To require compliance with such requirement or terms would run contrary to s 8 of the AA. If actual or real prejudice was a requirement that had to be met under s 37(1)(b)(ii) read with s 37(2)(b) of the AA, it was for the legislation to say so and not the court. In the circumstances, it was therefore inappropriate to apply case authorities from Singapore on how discretion under s 37 of the AA was to be exercised as the laws being compared were not in pari materia (see paras 48–49, 56, 67 & 69).

(3) Because s 37 vested the court with a wide discretion on whether to set aside an award, the decision to set aside an award was not an automatic outcome of the finding that there was a breach of the rules of natural justice. In considering whether discretion should be exercised to set aside an award, there had to be an evaluation of relevant factors such as the seriousness, magnitude or materiality of the breach, its nature and its impact, whether the breach would have any effect on the outcome of the arbitration (leaving room for 'casual breach or occasional error'), the costs of a rehearing and whether there was any delay in raising the complaint. This exercise was different from undertaking an exercise to show prejudice, which might be in several respects, including monetary rights. There was, however, no onus on the applicant to establish these factors. The judge in the instant case did not evaluate the relevant factors that would have properly weighed in any consideration to set aside the award but he was instead concerned with satisfying himself on whether the appellant had suffered any actual or real prejudice, which was not the approach that should have been applied (see paras 63–66).

(4) The two pieces of 'extraneous evidence' the arbitrator had relied upon in coming to his decision were based on the arbitrator's personal expertise, experience and/or knowledge. Although the arbitrator had power to draw from his own knowledge and expertise — and this was provided for in s 21(3)(b) of the AA — this power had to be read together with the arbitrator's overarching duty to act fairly and in accordance with the rules of natural justice as set out in s 20 of the AA. The arbitrator's duty to act fairly and to always afford parties reasonable opportunity to present their case or arguments on any live issue in the arbitration had to endure

throughout the whole arbitral process to protect the sanctity and finality of the award and for sound business and commercial practice. In the present case, absent any express agreement to the contrary, the arbitrator was obliged to have invited the parties to deal with or respond to the two pieces of 'extraneous evidence' and his line of reasoning on the issue of causation (see paras 70–72).

(5) The two instances of breach of the rules of natural justice in the instant case had a huge impact on the outcome of the arbitration and they were plainly in conflict with the public policy of Malaysia. Without the two pieces of extraneous evidence the arbitrator could not have been in a position to make the orders for monetary compensation in the form of payment for the extended period of charter hire and the costs of repair and reinstatement of the vessel, reimbursable items and the bank guarantee, together with interest. The cause of the damage was pivotal to the whole claim, whether for the extended hire or for the costs of repair simpliciter. Although the two pieces of extraneous evidence were relevant and material to the question of causation of the damage to the stinger hitch yet they were never indicated to the parties until the award was rendered by which time it was too late. The respondent's case was that the appellant's negligence had caused the damage. But the arbitrator had redefined the cause of the damage without giving the parties an opportunity to present their responses. This redefinition brought a new difference to the dispute which rendered the award liable to be set aside under s 37(1)(a) of the AA (see paras 89–94).

(6) The instant case was an appropriate one for judicial intervention. To resist intervention and not exercise discretion in the circumstances of the appeal was to deny justice (see para 95).

[Bahasa Malaysia summary

Perayu memasuki perjanjian dengan responden untuk menyewa baj pasang paip responden. Pertikaian berbangkit di antara pihak-pihak yang mana dirujuk kepada timbang tara. Pertikaian utama adalah ke atas siapa yang bertanggungjawab bagi kerosakan kepada *stinger hitch vesel*. Responden menyatakan bahawa kerosakan disebabkan oleh kecuaian perayu. Perayu menafikan liabiliti dan menyatakan terdapat kecacatan laten di dalam *stinger hitch* yang mana tidak jelas apabila pihak-pihak memeriksa bersama baj tersebut pada permulaan tempoh penyewaan. Apabila *stinger hitch*, yang mana adalah mekanisma yang boleh ditanggalkan, rosak semasa penggunaan, perayu mengimpalkannya kepada badan kapal vesel oleh itu menyebabkan perubahan struktur kepada vesel yang mana responden terpaksa membukanya dan mengembalikan vesel kepada keadaan asalnya dengan menjalankan pembaikan kepada vesel di dok kering. Responden kekal menyatakan bahawa perayu adalah bertanggungjawab untuk membayar caj-caj sewa semasa tempoh pembaikan dan untuk, antara lain, membayar bagi kos pembaikan dan

pengembalian semula vesel tersebut dan material/pelengkapan atas kapal yang mana sama ada telah diguna oleh perayu atau hilang atau rosak semasa baj di dalam milikan perayu. Penimbang tara memerintahkan bahawa perayu terpaksa, antara lain, membayar responden kos pembaikan/pengembalian semula vesel, kesemua caj-caj sewa yang belum dibayar dengan faedah dan kos barang yang boleh dibayar balik. Berkaitan kepada kerosakan kepada *stinger hitch*, penimbang tara mendapati daripada keterangan bahawa tidak terdapat kecuaian oleh pihak perayu, juga tidak terdapat kerosakan laten terhadap *stinger hitch* pada permulaan tempoh sewa dan bahawa vesel dihantar kepada perayu dalam keadaan boleh belayar. Penimbang tara, walau bagaimanapun, memutuskan bahawa, atas imbangan kebarangkalian, kerosakan kepada *stinger hitch* adalah disebabkan oleh 'continuing operation of the *stinger hitch* and the vessel in severe weather conditions by the respondent (ie, the appellant here) prior to and on the day the damage was discovered'. Dalam mencapai keputusan tersebut, penimbang tara bergantung ke atas dua 'extraneous evidence' (iaitu, keterangan pihak-pihak tidak mendedahkan semasa timbang tara), iaitu: (a) bahawa 'weather-induced erratic stress and loading had subjected the structural members of the stinger assembly to fatigue'; dan (b) bahawa 'continuous excessive loads accentuated by severe weather during the week resulted in the cracking of the plate which was one of the critical load bearing and load transfer members between the stinger hitch box and the hull of the vessel'. Penimbang tara mencapai kepada keputusannya 'even though the cause was not investigated through metallurgical or scientific methods of material analysis of the failed member (cracked plate) by the parties'. Perayu memohon kepada Mahkamah Tinggi untuk mengetepikan award timbang tara tersebut di bawah s 37(1)(a)(iv), 37(1)(b)(ii) dan 37(2)(b) Akta Timbang Tara 2005 ('ATT') dan/atau untuk mengetepikan atau mempelbagaikan award di bawah s 42 tersebut. Perayu berhujah bahawa dengan bergantung ke atas dua keterangan tidak berkenaan, penimbang tara telah menafikan perayu peluang munasabah untuk didengar ke atas keterangan tersebut dan bahawa oleh itu, terdapat pelanggaran peraturan-peraturan keadilan semula jadi yang menyebabkan award boleh diketepikan di bawah peruntukan ATT. Responden menentang permohonan tersebut dengan berhujah bahawa award tersebut tidak patut diganggu kerana walaupun terdapat pelanggaran peraturan-peraturan keadilan semula jadi, perayu tidak diprejudiskan. Mahkamah Tinggi bersetuju dengan hujahan responden dan, dengan bergantung ke atas dua keputusan mahkamah di Singapura, menolak permohonan perayu tersebut. Mahkamah memutuskan bahawa walaupun penggantungan ke atas dua-dua keterangan tidak berkenaan tersebut sebenarnya telah melanggar peraturan-peraturan keadilan semula jadi dengan menafikan pihak-pihak peluang untuk bersetuju atau tidak bersetuju dengan keterangan, perayu tidak dengan itu diprejudis dan oleh itu award tidak patut diketepikan. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dan mengetepikan kedua-dua keputusan

Mahkamah Tinggi dan award timbang tara:

(1) Walaupun hakim Mahkamah Tinggi adalah betul untuk mendapati bahawa keterangan tidak berkenaan diambil kira oleh penimbang tara dalam mencapai kepada keputusannya dalam pencabulan ss 20 dan 37 ATT, hakim tersilap apabila beliau mengguna pakai prinsip-prinsip salah dan gagal untuk menjalankan budi bicara untuk mengetepikan award tersebut (lihat perenggan 96).

(2) Walaupun hakim Mahkamah Tinggi telah secara betul menentukan dan membuktikan bahawa penimbang tara telah melanggar peraturan-peraturan keadilan semula jadi dengan bergantung ke atas dua 'extraneous evidence' bahawa penimbang tara telah dengan sendirinya membangkitkan tanpa memberi pihak-pihak peluang untuk menguji keterangan tersebut, hakim tersilap apabila beliau seterusnya mengkehendaki bahawa patut terdapat bukti sebenar prejudis yang dialami oleh perayu sebelum budi bicara untuk mengetepikan award boleh dijalankan. Meskipun hakim mengenal pasti bahawa kedudukan di bawah ss 37(1)(b)(ii) dan 37(2) ATT adalah berbeza daripada kedudukan di bawah bidang kuasa Singapura dan UK. Kehendak bahawa award timbang tara hanya dapat diketepikan jika pelanggaran keadilan semula jadi telah memprejudiskan atau menyebabkan ketidakadilan substansial kepada pemohon tidak didapati di dalam s 37 ATT walaupun ia mungkin adalah kehendak spesifik undang-undang timbang tara di Singapura dan UK. Mahkamah tidak patut membawa masuk ke dalam timbang tara Malaysia atau rejim litigasi pemahaman atau prinsip yang tidak diperuntukkan di bawah ATT. Untuk mengkehendaki pematuhan dengan kehendak atau terma tersebut akan melanggar s 8 ATT. Jika prejudis sebenar adalah kehendak yang perlu dicapai di bawah s 37(1)(b)(ii) dibaca bersama s 37(2)(b) ATT, ia adalah bagi undang-undang untuk menyatakannya dan bukan mahkamah. Dalam keadaan, oleh itu adalah tidak wajar untuk mengguna pakai autoriti kes daripada Singapura atas bagaimana budi bicara di bawah s 37 ATT hendak dijalankan kerana undang-undang apabila dibandingkan adalah tidak pari materia (lihat perenggan 48–49, 56, 67 & 69).

(3) Memandangkan s 37 meletakhakkan mahkamah dengan budi bicara luas atas sama ada untuk mengetepikan award, keputusan untuk mengetepikan award bukan keputusan automatik dapatan bahawa terdapat pelanggaran peraturan-peraturan keadilan semula jadi. Dalam mempertimbangkan sama ada budi bicara patut dijalankan untuk mengetepikan award, patut terdapat penilaian faktor-faktor relevan seperti keseriusan, magnitud atau kematanan pelanggaran, sifatnya dan kesannya, sama ada pelanggaran akan mempunyai apa-apa kesan atas keputusan timbang tara (untuk membenarkan ruang untuk 'casual breach or occasional error'), kos pendengaran semula dan sama ada

terdapat apa-apa kelewatan dalam membangkitkan aduan. Pelaksanaan adalah berbeza daripada pengusahaan pelaksanaan untuk menunjukkan prejudis, yang mana mungkin terdiri daripada beberapa aspek, termasuk hak kewangan. Walau bagaimanapun tidak terdapat beban ke atas pemohon untuk membuktikan faktor-faktor ini. Hakim dalam kes ini tidak menilai faktor-faktor relevan yang akan secara betul dipertimbangkan di dalam apa-apa pertimbangan untuk mengetepikan award tetapi beliau sebaliknya mementingkan untuk memuaskan dirinya sendiri atas sama ada perayu telah mengalami apa-apa prejudis sebenar, yang mana bukan pendekatan yang patut digunapakai (lihat perenggan 63–66).

(4) Kedua-dua 'extraneous evidence' yang diguna oleh penimbang tara dalam mencapai kepada keputusannya adalah berdasarkan ke atas kepakaran peribadi penimbang tara, pengalaman dan/atau pengetahuan. Walaupun penimbang tara mempunyai kuasa untuk menarik daripada pengetahuan dan kepakarannya — dan ini diperuntukkan dalam s 21(3)(b) ATT — kuasa ini perlu dibaca bersama dengan tugas utama penimbang tara untuk bertindak dengan adil dan mengikut peraturan-peraturan keadilan semula jadi seperti yang ditetapkan di dalam s 20 ATT. Tugas penimbang tara untuk bertindak dengan adil dan untuk selalu memberikan kepada pihak-pihak peluang munasabah untuk mengemukakan kes atau penghujahan mereka atas apa-apa isu semasa dalam timbang tara perlu bertahan sepanjang keseluruhan proses timbang tara untuk melindungi kesucian dan kemuktamadan award tersebut dan untuk amalan perniagaan dan komersial yang mantap. Dalam kes ini, ketiadaan apa-apa perjanjian nyata, penimbang tara adalah bertanggungjawab untuk menjemput pihak-pihak berurusan atau menjawab kepada kedua-dua 'extraneous evidence' tersebut dan alasannya atas isu kausa (lihat perenggan 70–72).

(5) Kedua-dua kejadian pelanggaran peraturan-peraturan keadilan semula jadi dalam kes ini mempunyai kesan besar ke atas keputusan timbang tara dan ia jelas berkonflik dengan polisi awam Malaysia. Tanpa kedua-dua keterangan yang tidak berkenaan penimbang tara tidak boleh berada dalam kedudukan untuk membuat perintah-perintah bagi pampasan kewangan dalam bentuk bayaran bagi tempoh pelanjutan sewa dan kos pembaikan dan pengembalian semula vesel, barangan boleh dibayar balik dan jaminan bank, bersama dengan faedah. Punca kerosakan adalah penting kepada keseluruhan tuntutan tersebut, sama ada untuk sewa lanjutan atau untuk kos pembaikan *simpliciter*. Walaupun kedua-dua keterangan tidak berkenaan adalah relevan dan material kepada soalan kausa terhadap kerosakan kepada *stinger hitch* tetapi ia tidak pernah ditunjukkan kepada pihak-pihak sehingga award tersebut diberikan dan pada ketika itu adalah terlalu lewat. Kes responden adalah bahawa kecuaian perayu telah menyebabkan kerosakan. Tetapi penimbang tara

telah mentakrifkan semula kausa kerosakan tanpa memberikan pihak-pihak peluang untuk mengemukakan jawapan mereka. Pentakrifan semula membawa kepada perbezaan baru kepada pertikaian yang menyebabkan award boleh diketepikan di bawah s 37(1)(a) ATT (lihat perenggan 89–94).

(6) Kes ini adalah satu yang wajar bagi campur tangan kehakiman. Untuk menentang campur tangan dan tidak menjalankan budi bicara dalam keadaan rayuan adalah menfaikan keadilan (lihat perenggan 95).]

Notes

For cases on setting aside, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2021–2107.

Cases referred to

AKN & Anor v ALC & Ors and other appeals [2015] SGCA 18, CA (refd)

Ahmani Sdn Bhd v Petronas Penapisan (Melaka) Sdn Bhd [2015] 11 MLJ 32; [2015] 9 CLJ 782, HC (refd)

Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd [2004] 2 NZLR 614, CA (refd)

Apa Insurance Co Ltd v Chrysanthus Barnabas Okemo [2005] eKLR, HC (refd)

Christ For all Nations v Apollo Insurance Co Ltd [2002] 2 EA 366 (refd)

Downer-Hill Joint Venture v Government of Fiji [2005] 1 NZLR 554, HC (refd)

ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors [2013] 3 MLJ 35; [2013] 1 LNS 99, CA (refd)

Elektrim SA v Vivendi Universal SA and others [2007] EWHCA 11 (Comm), QBD (refd)

Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd [2010] SGHC 80, HC (refd)

Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1) [2012] 4 HKLRD 1, CA (refd)

Hebei Import & Export Corporation v Polytek Engineering Company Limited [1999] 2 HKCFAR 111, HC (refd)

Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd [2015] 6 MLJ 126; [2015] 1 CLJ 617, CA (refd)

Kyburn Investments Ltd v Beca Corporate Holdings Ltd [2015] 3 NZLR 644, CA (folld)

MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd & Anor [2015] MLJU 477, HC (refd)

PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SS [2007] 1 SLR 597, CA (refd)

PT Prima International Development v Kempinski Hotel SA & Other Appeals [2012] 4 SLR 98, CA (refd)

Perwira Bintang Holdings Sdn Bhd v Kerajaan Malaysia [2014] 11 MLJ 561, HC (refd)
Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd [2016] 2 MLJ 697; [2016] 3 CLJ 403, CA (refd)
Shanghai Fusheng Soya Food Co Ltd and another v Pulmuone Holdings Co Ltd [2014] HKEC 825, HC (refd)
Soh Beng Tee Co & Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR 86, CA (refd)
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83, FC (refd)
The Government of India v Cairn Energy India Pty Ltd & Ors [2014] 9 MLJ 149, HC (refd)
Trustees of Rotoaira Forest Trust v Attorney-General [1999] 2 NZLR 452, HC (refd)
Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223

Legislation referred to

Arbitration Act [SG] ss 24, 48, 48(1)(a), (1)(a)(vi), (1)(a)(vii), (1)(b)
Arbitration Act 1996 [NZ] Schedule 1, r 34(2)(b)(ii), 34(6)(b)(i), (6)(b)(ii)
Arbitration Act 1996 [UK] s 68, 68(2)(a), (2)(b), (2)(c), (2)(d), (2)(e), (2)(f), (2)(g), (2)(h), (2)(i)
Arbitration Act 2005 ss 8, 20, 21, 21(3)(b), 25, 26, 37, 37(1)(a), (1)(a)(iv), (1)(a)(v), (1)(b), (1)(b)(i), (1)(b)(ii), (2), (2)(a), (2)(b), (2)(b)(i), (2)(b)(ii), (3), (6), 42, 42(4)(b), (4)(d)
International Arbitration Act [SG] s 24

Appeal from: Originating Summons No 24C(NCC)-120–03 of 2015 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (Chew Chang Min and Surendra Ananth with him) (Kheng Hoe) for the appellant.
Gan Khong Aik (Kang Mei Yee with him) (Gan Partnership) for the respondent.

Mary Lim JCA (delivering judgment of the court):

INTRODUCTION

[1] The appeal before us concerns an application to set aside an arbitration award dated 23 January 2015 under ss 37 and 42 of the Arbitration Act 2005 ('Act 646'). In the course of submissions, learned counsel for the appellant confined the appeal to complaints under s 37, more specifically s 37(1)(b)(ii) and 37(2)(b) of Act 646. The complaint under these two provisions is that there is a breach of the rules of natural justice either during the arbitral proceedings or in connection with the making of the award and that such

breach is in conflict with the public policy of Malaysia. Consequently, the award must be set aside.

[2] The learned JC agreed with the appellant and found that the learned arbitrator had indeed committed two breaches of natural justice under s 20 read with s 37(1)(b)(ii) and 37(2)(b) of Act 646 during the arbitration proceedings and during the deliberation and making of the award. Despite such finding, the learned JC nevertheless dismissed the application on the ground that the appellant was not prejudiced by the breaches.

[3] It is the appellant's argument that s 37(1)(b)(ii) and 37(2)(b) do not require proof of prejudice, whether actual or real, before the discretion is exercised in its favour. Consequently, the learned JC is in error and the appeal must be allowed. We were constrained to disagree with the learned JC. We unanimously found that His Lordship had misdirected and misapprehended the law such that appellate intervention is warranted in this appeal. We therefore allowed the appeal.

SOME FACTUAL BACKGROUND

[4] The appellant chartered a pipe-laying barge, 'PLB MAS Mulia' (vessel) from the respondent to carry out, amongst others, pipe-laying works in Indonesia. A charter party agreement dated 23 October 2012 based on standard form 'BIMCO Time Charter Party for Offshore Services Code Name Supplytime 2005' was signed between the parties ('CPA'). The original period of hire from 23 October 2012 to 21 November 2012 was extended twice with the final date being 26 January 2013. The charter party was paid until 14 February 2013 and the vessel was redelivered on 5 March 2013.

[5] As required under cl 43 of the CPA, the appellant provided an irrevocable, unconditional and 'on demand' bank guarantee for a sum of RM3,719,115 ('BG') in favour of the respondent. When the charter period was extended, this BG was not extended. The appellant obtained a declaratory order from the High Court at Kuala Lumpur that the BG had expired and that the respondent was not entitled to call on the BG. The respondent did not appeal against that order.

[6] On 7 March 2013, a surveyor, Matthews Daniel International Pte Ltd ('MDI'), appointed by the respondent (MDI's appointment had not been agreed to by the respondent), discovered the stinger hitch of the vessel, damaged. A dispute arose between the parties over who is to bear the costs of its repair.

[7] The respondent claimed that it was the appellant who had damaged the

stinger hitch and had failed to inform them of its damage when the vessel was redelivered. By letter dated 8 March 2013, the respondent put the appellant on notice requiring the vessel to be redelivered in its original condition, failing which the vessel would remain on hire and the appellant was obliged to reinstate the vessel. By another letter dated 12 March 2013, the respondent required the appellant to submit a proposal to repair and/or reinstate the vessel failing which the respondent would do so at the appellant's expense, as provided under cl 4 of the CPA.

[8] By letter dated 14 March 2013, the appellant disputed liability. The appellant claimed that it was in fact the respondent who was in breach of express and/or implied representations of the CPA. Under cl 3(a) of the CPA, the respondent is said to have represented that the vessel would be fit for the purpose as stated in Box 17, Part 1 CPA read with Annex A to the CPA; and under cl 3(b), and that it would exercise proper control and command of the vessel and its equipment. The appellant claimed that the respondent was in breach when it delivered the vessel with the stinger hitch which was not in good operating condition. The appellant claimed that the stinger hitch in fact had a hidden damage which could not be discovered at the joint inspection conducted before the commencement of the charter hire. And despite operating the stinger hitch 'well within its accepted parameters', the stinger hitch broke down and the vessel could not be used for 10.77 days. The appellant further claimed that the respondent had failed and/or neglected to exercise proper control over the operations of the stinger hitch, pedestal crane and winch No 7, all of which were damaged on 9 January 2013, and which the appellant had to repair at substantial cost. The appellant consequently claimed that it was not obliged to pay charter hire for the relevant period and it counterclaimed for costs of repair.

[9] The respondent proceeded to repair and/or reinstate the vessel, completing the repairs on 22 May 2013. The respondent claimed that the appellant was obliged to pay daily charter hire for the charter period from 15 February–22 May 2013. The respondent also claimed costs of repairs and/or reinstatement of the vessel, usage of consumables, medicine, tools, communications and equipment of the vessel during the charter period, etc, and extension of the validity of the BG for the extended period of charter.

[10] The disputes between the parties were referred to arbitration. The respondent's original points of claim were filed on 16 January 2014. The appellant's defence and counterclaim was filed on 1 April 2014 to which the respondent filed a reply and defence on 6 May 2014. All these were subsequently amended. The respondent filed amended points of claim on 15 September 2014, the appellant filed a re-amended defence and counterclaim on 20 October 2014, and the respondent filed an amended reply

and amended defence to counterclaim on 3 November 2014. The appellant's counterclaim was, inter alia, for the costs of repair.

THE AWARD

[11] On 23 January 2015, the learned arbitrator rendered an award in the following terms:

(a) the appellant shall pay the respondent the sum of USD3,023,269.52 for the outstanding charter hire payments ('first sum');

(b) the appellant shall pay the sum of USD82,332.33 as pre-award interest on the first sum;

(c) the appellant shall pay the respondent the sum of RM502,141.47 in full and final settlement of the respondent's claims in the arbitration towards repair and reinstatement of the vessel, reimbursable items and BG;

(d) all other claims by the respondent and the appellant (including claims by way of defence and counterclaim) are dismissed; and

(e) the appellant shall pay the respondent post-award simple interest at the rate of 5%pa from the date of award until the date of full payment.

THE APPLICATION BEFORE THE HIGH COURT

[12] The appellant took umbrage with the award, in particular para 407 of the award, alleging, inter alia, that the learned arbitrator is in breach of the rules of natural justice in coming to his decision. The appellant filed the originating summons seeking to set aside the award under s 37(1)(a)(iv), 37(1)(b)(ii) and 37(2)(b) of Act 646 and/or to set aside or vary the award under s 42 of Act 646 based on 11 'questions of law' that it has framed and which it claimed to have arisen from the award.

[13] It was the appellant's contention that the respondent's claim, as pleaded and argued throughout the arbitration was, inter alia, for a declaration that the period of hire under the CPA was until 22 May 013 (when the respondent itself completed the repairs) and, for costs of repairs and/or reinstatement of the vessel, machine and equipment. The claim and the various reliefs sought were always tied to or premised on the complaint that the appellant had negligently caused damage to the vessel's stinger hitch area and equipment resulting in repairs. In order to do the repairs, the vessel had to be dry docked and so, the vessel could not be hired out. Until the vessel was redelivered in the state that it was hired out to the appellant and that was not until 22 May 2013, the vessel was considered as still on hire to the appellant. Consequently, the respondent claimed that the appellant had to pay for the hire until 22 May 2013 as well as for the repairs and the costs for reinstating the vessel.

[14] The appellant claimed that the respondent's claim was never that the vessel had to be dry docked and repaired independent of any negligence on the part of the appellant. The allegation of negligence was always a 'central issue and feature of the arbitration'. Despite concluding that negligence was not established and dismissing the respondent's claim that the appellant's negligence had caused damage to the stinger hitch (paras 396, 398 and 400 of the award), the learned arbitrator nevertheless proceeded (para 407 of the award) to state that:

> It is reasonable and fair to believe that the weather induced erratic stress and loading, the structural members of the stinger assembly were subjected to fatigue. Further due to continuous excessive loads accentuated by severe weather during the week resulted in the cracking of the plate, which is one of the critical load bearing and load transfer member between the stinger hitch box and the hull of the vessel. This cause even though not investigated through metallurgical or scientific methods of material analysis of the failed member (cracked plate) by the parties, but on the balance of the probabilities, the Tribunal finds that the damage is sustained due to continuing operations of the stinger and the vessel in severe weather conditions by the respondent, prior to and on the day the damage was discovered.

[15] It is the appellant's submission that in coming to that decision, the learned arbitrator had:

(a) relied on extraneous material without affording the appellant a reasonable opportunity to be heard on such material;

(b) dealt with a dispute that was not contemplated by or not falling within the terms of the submission to arbitration within the meaning of s 37(1)(a)(iv); and

(c) dealt with and decided on a 'new difference' without affording the appellant a reasonable opportunity to be heard.

[16] The appellant alleged that by virtue of the first basis, the learned arbitrator was consequently in breach of the rules of natural justice which renders the award liable to be set aside.

[17] The application was opposed. The respondent urged the High Court not to exercise its discretion in the appellant's favour; taking into account four considerations:

(a) party autonomy;

(b) finality and binding nature of the award;

(c) that the court is not vested with appellate jurisdiction in such matters; and

A (d) the minimalist approach of the court under s 8 of the Arbitration Act 2005.

[18] It was further urged upon the High Court that independent of the appellant's concerns, the respondent nevertheless had an alternative prayer pursuant to cl 4 of the CPA. The findings on cl 4 which does not depend on the findings on the two extraneous evidence where the breach of the second rule of natural justice relates, are not challenged. This alternative ground is said to be capable of sustaining the whole of the award. More importantly, the respondent urged the court to dismiss the application on the basis that even if there were the breaches as alleged, the appellant was not prejudiced by the failure or breach.

[19] The learned JC agreed with the appellant and found that there were two instances of breach of natural justice as alleged. However, the learned JC was not inclined to grant the orders sought, agreeing with the respondent that there was no need to set aside the award because there was no prejudice suffered by the appellant. The application was then dismissed.

OUR DECISION

[20] We note that at the High Court, the appellant had confined its arguments to the first ground (s 37(1)(b)(ii) and 37(2)(b)) and to questions of law referred under s 42. The other grounds were not pursued. The learned JC nevertheless dealt with those grounds and after considering them, rejected those grounds. Those grounds do not arise in this appeal; similarly, the arguments in respect of s 42 were not pressed and consequently, will not be addressed in this judgment. We shall confine our deliberations to s 37(1)(b)(ii) and 37(2)(b), the grounds relied on in the application and in this appeal.

[21] We do, however, have to state for the record that although there were several grounds cited in support of its challenge to set aside the award, finally what was pursued before us was this very limited argument. We take the position that inasmuch as there may be other grounds that may very well have saved the award, as canvassed by the respondent, the presence of one ground, certainly one as serious as that presently relied, if proved, is enough basis to successfully set aside an award.

[22] Section 37 of Act 646 provides for the instances when the court may, in keeping with the terms of s 8, intervene to set aside an arbitration award:

> 37 *Application for setting aside*
>
> (1) *An award may be set aside by the High Court only if —*
>
> (a) the party making the application provides proof that —

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) *the High Court finds that —*

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) *the award is in conflict with the public policy of Malaysia.*

(2) *Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where —*

(a) the making of the award was induced or affected by fraud or corruption; or

(b) *a breach of the rules of natural justice occurred —*

(i) *during the arbitral proceedings; or*

(ii) *in connection with the making of the award.*

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

(4) An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or, if a request has been made under section 35, from the date on which that request had been disposed of by the arbitral tribunal.

(5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(6) On an application under subsection (1) the High Court may, where appropriate and so requested by a party, adjourn the proceedings for such

A period of time as it may determine in order to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside. (Emphasis added.)

B **[23]** There are several observations to be made of the terms of s 37 that are relevant to the present appeal.

[24] First, s 37(1)(a) and (1)(b) are disjunctive provisions in that an award may be set aside under any of these provisions. Within ss 37(1)(a) and (1)(b) C are further sub provisions providing for the various grounds upon which an award may be set aside. These grounds may be relied on cumulatively or otherwise.

D **[25]** Second, it is only upon proof of the presence of any of the grounds relied on that an award may be set aside. Although unlike s 37(1)(a) and 37(1)(b) does not expressly state that the appellant must prove the matters complained of, whether under s 37(1)(b)(i) or (1)(b)(ii), it makes sense that there must be evidence presented in order for the court to find if either of the E two grounds under s 37(1)(b), exists. The court does not embark on any independent exercise to find if the conditions or grounds under s 37(1)(b)(i) or (ii) are met.

[26] Third, in understanding the intent, ambit and application of F s 37(1)(b)(ii), regard should be had to s 37(2). A challenge under s 37(1)(b)(ii) requires the court to find that the award is in conflict with the public policy of Malaysia. Although the phrase 'public policy of Malaysia' is not defined in the Act, there is indication in s 37(2) of what the drafters and thereby Parliament had in mind as to what may amount to a conflict with the public policy of G Malaysia. Section 37(2) explains or illustrates that an award is in conflict with the public policy of Malaysia where either: (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred either: (i) during the arbitral proceedings; or (ii) in connection with the making of the award.

H

[27] The examples or illustrations in s 37(2) to explain what circumstances or conditions may be considered as conflicting with the public policy of Malaysia, are by no means exhaustive. This is made plain by its opening terms: 'Without limiting the generality of subparagraph (1)(b)(ii)'. Any other I circumstance or complaint of the presence of a conflict with public policy however, must fall within the genre set out in s 37(2)(a) and (2)(b). In other words, the sui generis rule should apply. The court should however, be slow in acceding to any suggestion to expand the recognised and established categories of conflict with public policy.

[28] In the High Court decisions of *MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd & Anor* [2015] MLJU 477 and *The Government of India v Cairn Energy India Pty Ltd & Ors* [2014] 9 MLJ 149 (both decisions were affirmed on appeal and in the latter case, leave to appeal to the Federal Court was refused), the question and approach of the court when faced with a charge of violations of public policy were discussed in extensive detail. Decisions from various jurisdictions such as Singapore, Australia, New Zealand, Hong Kong, United Kingdom and Canada were compared before the High Court concluded that the interpretation of what may amount to a conflict with public policy is at the end of the day, quite similar in the various jurisdictions, especially those that adopt model law arbitration regimes.

[29] The cases considered included *Hebei Import & Export Corporation v Polytek Engineering Company Limited* [1999] 2 HKCFAR 111; *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554; *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80; *Soh Beng Tee Co & Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86; *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SS* [2007] 1 SLR 597; *Elektrim SA v Vivendi Universal SA and others* [2007] EWHCA 11 (Comm); *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614; *Shanghai Fusheng Soya Food Co Ltd and another v Pulmuone Holdings Co Ltd* [2014] HKEC 825; *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] 4 HKLRD 1; and *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83. From the cases and the views of the respected author on arbitration, *Redfern and Hunter on International Arbitration,* the High Court there summarised the approach of the court when dealing with the ground of conflict with public policy of Malaysia as follows.

[30] In the first place, the concept of public policy is itself a 'broad' concept: see *Apa Insurance Co Ltd v Chrysanthus Barnabas Okemo* [2005] eKLR where the following remarks of Justice Ringera in *Christ For all Nations v Apollo Insurance Co Ltd* [2002] 2 EA 366 were cited:

> I am persuaded by the logic of the Supreme Court of India and I accept the view that although public policy is a most broad concept incapable of precise definition, or that, as the common law judges of yonder years used to say, it is an unruly horse and when once you get astride of it, you never know where it will carry you, ...

[31] Next, having regard to the context of the dispute, that it arises out of commercial and contractual transactions where parties may be said to have received advice including legal advice, the conflict with public policy ground that is envisaged in s 37(1)(b)(ii) ought to be read narrowly and more restrictively. The court's curial intervention should be sparingly used; and this would be in keeping with the terms in s 8 of Act 646.

[32] This then makes the threshold to be met somewhat high in that by its very nature, 'it should be immediately obvious or at least fairly rapidly apparent that there has been such a breach or conflict with the public policy of Malaysia ... The Court must be compelled to agree or that a strong case has been made out that the award conflicts with the public policy of Malaysia. Otherwise, the contractual arrangements of the parties must be maintained'.

[33] Further, 'it must be understood that the notion or concept of public policy in arbitration is not one grounded in public law, generally understood as the *Wednesbury* principles. In other words, the award will not be set aside simply because it is irrational or unreasonable or one that is so irrational or unreasonable that no reasonable person could have made such an award. The concept of public policy must be one taken in the 'higher sense, where some fundamental principle of law and justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the 'integrity of the Court's process and powers will thereby be abused'.

[34] Fourth, where such a breach within the terms of s 37(1)(b)(ii) read with s 37(2)(b) has been established, it is the whole award that will be set aside. The terms of s 37 do not appear to allow for the operation of the principle of severance, especially in view of the terms of s 37(3) read with s 37(1)(a)(v). Subsection 37(3) provides that where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside. The words 'matters submitted to arbitration can be separated from those not so submitted' are peculiar to the terms appearing in s 37(1)(a)(v), the only provision which makes specific reference to s 37(3), that it is read 'subject to subsection (3) ...'.

[35] This issue was discussed at the first instance in *Ahmani Sdn Bhd v Petronas Penapisan (Melaka) Sdn Bhd* [2015] 11 MLJ 32; [2015] 9 CLJ 782 and implicitly endorsed by the Court of Appeal subsequently on appeal — see *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697; [2016] 3 CLJ 403. This brings the necessary conclusion that where the award conflicts with the public policy of Malaysia (where there is a breach of the rules of natural justice), it is the whole award which will be set aside, and not only a suggested part of the award.

[36] The learned JC makes reference to this observation at paras 54–55 of the grounds of decision, comparing s 37 with s 42 to fortify his conclusion that the court's power to set aside part of an award is only under ss 42(4)(b) and (4)(d), and not under ss 37(1)(b)(ii) and 37(2)(b). The learned JC was cognisant of the fact that if he agreed with the appellant, it would be the whole award which will be set aside and not a part of it.

[37] This brings us to the fifth point. In the same decision of the Court of Appeal in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd*, is the view expressed that the threshold to satisfy under s 37 is *'very low* (though the courts are slow in setting aside the award) and upon proof if successful, the court has an option to send back the matter to the arbitral tribunal to eliminate the grounds for setting aside, as set out in s 37(6)'.

[38] We have no reason to depart from or reconsider the view expressed in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* that the threshold under s 37 is 'very low' as compared to that under s 42. But, the option of sending the award back to the arbitrator to resume arbitration proceedings does not arise in this appeal as no application or request under s 37(6) was made to the High Court at the material time. Neither party applied for the proceedings before the High Court to be adjourned pending a reference back to the arbitrator for resumption of hearing of the arbitration. We are of the view that the option under s 37(6) is at either party's behest and not on the court's own invocation.

[39] Further, however 'low' the threshold to be met under s 37(1)(b)(ii) or 37(2) (see *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd),* it can only be on a balance of probabilities, that there has been a breach of the rules of natural justice either during the arbitral proceedings or in connection with the making of the award.

[40] Putting thus the above principles into play in this appeal, the allegation here is under s 37(1)(b)(ii) read with s 37(2)(b)(i) and (2)(b)(ii). The appellant contended that the award conflicts with the public policy of Malaysia because there was a breach of the rules of natural justice during the arbitral proceedings and/or in connection with the making of the award. More specifically, the breach occurred when the learned arbitrator relied on extraneous evidence in coming to his decision and the award. This issue is both a question of fact and law. It is a question of fact in that the allegation must be established to exist on the facts; a question of law in that such allegation must amount to a breach of the rules of natural justice within the terms and scope of s 37(1)(b)(ii) read with s 37(2)(b).

[41] In the present appeal, the learned JC found that the appellant had indeed established the two instances of breaches of natural justice after considering the effect and implication of ss 20, 21, 25 and 26 of the Act. Section 20 provides that an arbitrator shall treat parties equally and that each of them must be given a fair and reasonable opportunity to present its case, while ss 21, 25 and 26 deal with various procedural matters and the related powers of the arbitrator that are to be attended to in the arbitration. After considering the meaning and implication of these provisions, according to the learned JC, the

learned arbitrator 'seemed to have considered and accepted two pieces of 'extraneous evidence' (not adduced by the plaintiff and defendant)' at para 407 of the award. Those two pieces of extraneous evidence were:

(a) 'weather induced erratic stress and loading' subjected the structural members of the Stinger Hitch to fatigue; and

(b) 'continuous excessive loads accentuated by severe weather during the week, resulted in the cracking of the plate'.

[42] Although admitting that '[T]his cause even though not investigated through metallurgical or scientific methods of material analysis of the failed member (cracked plate) by the parties', the learned arbitrator proceeded to say that 'on the balance of the probabilities, the Tribunal finds that the damage is sustained due to continuing operations of the stinger and the vessel in severe weather conditions by the respondent, prior to and on the day the damage was discovered'.

[43] The learned JC found the two allegations of breaches, established. At para 50 of the judgment, the learned JC said:

> 50. I am satisfied that the parties have been caught by surprise regarding the two items of extraneous evidence. The arbitrator has committed the two breaches under ss 20, 37(1)(b)(ii) and 37(2)(b) of the AA in the following manner —
>
> (a) the arbitrator had failed to inform the parties of the two items of extraneous evidence that the arbitrator might rely on and which the arbitrator did indeed subsequently rely on in para 407; and
>
> (b) the arbitrator had dialed to give parties an opportunity to —
>
> (i) test the two items of extraneous evidence;
>
> (ii) adduce admissible evidence, including expert evidence to —
>
> (1) prove or disprove the existence of the two items of extraneous evidence; and/or
>
> (2) corroborate or rebut the two items of extraneous evidence; and
>
> (iii) submit, in writing and/or orally, in respect of the two items of extraneous evidence.

[44] Despite such findings, the learned JC decided that discretion should not be exercised in the appellant's favour. At part Q paras 51–53, following two decisions from Singapore, His Lordship held that 'even if there has been a breach of the second rule of natural justice, the court will not set aside an award unless such a breach has caused prejudice to a plaintiff'. The two decisions being *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* and *AKN & Anor v ALC & Ors and other appeals* [2015] SGCA 18. In *Soh Beng Tee & Co Pte*

Ltd v Fairmont Development Pte Ltd, VK Rajah JA had held as follows:

> 86. It is necessary to prove that the breach, if any, had caused actual or real prejudice to the party seeking to set aside an award. It may well be that though a breach has preceded the making of an award, the same result could ensue even if the arbitrator had acted properly.

[45] In *AKN & Anor v ALC & Ors,* Sundaresh Menon CJ had said:

> 67. Based on the Tribunal's conclusion that the TAA did not alter the obligation owed by the liquidator and the secured creditors to transfer clean title to the plant assets to the purchasers on the closing date, on the tribunal's analysis, this obligation had been breached from the onset. Hence, even if the tribunal had failed to consider the liquidator's and/or the secured creditor's arguments on the revocation of the TAA or had wrongly attributed the arguments of one party to the other party, and even if this had amounted to a breach of natural justice, it was unlikely to materially affect the conclusion which the tribunal reached on its analysis of the APA, namely, that the liquidator and the secured creditors had breached the obligation to deliver clean title to the plant assets under the APA.
>
> 68. For these reasons, we do not agree with the judge that there was a breach of natural justice which prejudiced the liquidator and the secured creditors, and accordingly, also do not consider that there is any basis for setting aside the award on this ground.

[46] At para 52, the learned JC said:

> 52. After perusing the parties' pleadings, written submissions and the award, I am of the view that even though the arbitrator has committed the two breaches under ss 20, 37(1)(b)(ii) and 37(2)(b) of the AA, the plaintiff has not suffered any actual or real prejudice which will warrant intervention in this case. My decision is premised on the following reasons:
>
> (a) as explained in the above para 35, there are 3 principal issues to be decided by the arbitrator in this case. Paragraph 407 merely concerned the cause of damage to the Stinger Hitch. Paragraph 407 is not even one of the 3 principal issues. Paragraph 407 does not affect the following 2 principal issues —
>
> (i) whether the charter period had been extended in this case; and
>
> (ii) whether the plaintiff should have extended the BG under clause 43.
>
> Accordingly, the two breaches concerning paragraph 407 do not prejudice the plaintiff in any manner in respect of the above 2 of the 3 principal issues.
>
> (b) paragraph 407 was part of the third principal issue, namely who caused the damage to the vessel, including the Stinger Hitch, and the liabilities that arose therefrom (Third Principal Issue). In respect of the third principal issue, the arbitrator has made the following findings —
>
> (i) the arbitrator had rejected the plaintiffs averment that the vessel had

a hidden damage which could not be discovered by the plaintiff during the pre-charter joint inspection (paras 222–250 of the award). In other words, there was no evidence that the Stinger Hitch had a latent damage at the time of the commencement of the charter period when the vessel was handed by the defendant to the plaintiff;

(ii) in paras 461 to 466 of the award, the arbitrator had found that the defendant had discharged its obligations under clause 3(a) to deliver the vessel in a seaworthy condition;

(iii) the arbitrator has also decided that the plaintiff and not the defendant had management and control of the vessel (paragraphs 479–486 of the award). In other words, the damage to the Stinger Hitch was caused while the plaintiff had management and control of the vessel, including the Stinger Hitch;

(iv) the arbitrator had upheld the defendant's claim that the plaintiff had effected structural alteration to the vessel by welding the detachable Stinger Hitch to the hull of the vessel (paras 487–504 of the award). As such, the arbitrator had decided that to remove this structural alteration, the vessel needed to go to a dry dock to be reinstated to its original condition as reinstatement could not be carried out while the vessel was afloat; and

(v) the arbitrator had found that he plaintiff should be liable to the defendant for the cost of repair and/or reinstatement of the vessel (paras 426–450 of the award). The arbitrator had also dismissed the plaintiff's counterclaim.

(c) the arbitrator's findings on 3rd principal issue are based on —

(i) the evidence adduced by the parties in the arbitral proceedings conducted before the Arbitrator; and

(ii) the submission made by the parties to the Arbitrator;

(d) I have perused the Arbitrator's Findings on 3rd Principal Issue and I am satisfied that the Arbitrator has given adequate and detailed reasons for the Arbitrator's Findings on 3rd Principal Issue; and

(e) based on the above reasons, in the words of Sundaresh Menon CJ in *AK.* I do not see how the 2 breaches could have 'materially affect' the arbitrator's findings on 3rd principal issue and the final outcome of the award. Nor can I discern any 'actual or real prejudice' to the plaintiff caused by the 2 breaches (as explained by VK Rajah JA in *Soh Beng Tee & Co*).

53. Even if the two breaches have been committed by the Arbitrator, the many cases cited by Mr Chew can be distinguished from this case as the plaintiff has filed to show that the two breaches have caused actual or real prejudice to the plaintiff.

[47] It is clear from the above that what the learned JC did was after having

satisfied himself that there were two instances of breaches of natural justice within the terms of ss 20, 37(1)(b)(ii) and 37(2), discretion would still not be exercised to set aside the award because according to His Lordship, there was no actual or real prejudice suffered by the appellant. The learned JC subjected the application to the further test of prejudice, as is required under the laws of Singapore and the UK which were referred to.

[48] This is where we agree with the submissions of learned counsel for the appellant that the learned JC had erred. Although His Lordship was correct in his deliberations in ascertaining whether there were any breaches of the rules of natural justice, and for that, His Lordship rightly embarked on an examination of the duties of the arbitrator, establishing that there were these two duties which we see are core duties, and how those duties may be breached, His Lordship erred when he went further to require that there must be proof of actual or real prejudice suffered by the appellant before discretion is exercised in its favour even where breach has been established. His Lordship did so despite recognising that the position under our s 37(1)(b)(ii) and 37(2) is different from that under those two jurisdictions. At para 44(g) of the decision, the learned JC expressed the view that:

> (g) In respect of the effect of two breaches, our s 37(2)(b) of the AA does not require proof that the two breaches have prejudiced the rights of the plaintiff. Section 48(1)(a)(vii) SA and s 24(b) SIAA provide that an award can only be set aside if the breach of natural justice has prejudiced the plaintiff's rights. According to s 68(2)(a) of the AA (UK), the court may intervene in respect of a serious irregularity [such as a failure on the part of the Tribunal to comply with the Tribunal's duty to act fairly under s 33 of the AA (UK)], if the serious irregularity 'has caused or will cause substantial injustice to the applicant.

[49] We say, with respect, that His Lordship has erred as that additional requirement is not found under s 37 of Act 646. It may be the specific requirements of the arbitration laws of Singapore or even the UK, but it is not required under s 37. To require such compliance or terms would, in our view, run contrary to the terms of s 8 of the Act. The powers of the court to intervene in arbitration matters are as prescribed by the Act. We should refrain from importing into our arbitration or litigation regime an understanding or principle which is not provided for under our very own statute. Were the requirement for actual or real prejudice a requirement to be met under s 37(1)(b)(ii) read with s 37(2)(b), it would be for the legislation to say so, and not the court.

[50] As explained earlier, our s 37(1)(b)(ii) and 37(2) seeks to provide some illustration of what or when an award may be said to be in conflict with the public policy of Malaysia; the two illustrations being where the making of the award is induced or affected by fraud or corruption, or where a breach of the

rules of natural justice occurred during the arbitral proceedings, or in connection with the making of the award. The regime in Singapore is quite different.

[51] Under s 48 of Singapore's Arbitration Act, in particular s 48(1)(b), an award may be set aside if it is contrary to public policy; but 'public policy' is not defined at all; it stands alone as a ground under s 48(1)(b). The two grounds of fraud or corruption and a breach of the rules of natural justice, which are part of the illustrations under our s 37(2)(a) and (2)(b), in the case of Singapore, are actually part of the various grounds found in s 48(1)(a). These grounds are to be found in s 48(1)(a)(vi) and (1)(a)(vii). Under s 48(1)(a)(vii), an award may be set aside if the applicant proves to the satisfaction of the court that 'a breach of the rules of natural justice occurred in connection with the making of the award *by which the rights of any party have been prejudiced*'.

[52] Section 24 of the Singapore's International Arbitration Act contains terms similar to its s 48 of the domestic Arbitration Act:

> 24 Court may set aside award
>
> Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

[53] Again, like its s 48 counterpart, a breach of the rules of natural justice must have prejudiced the rights of any of the parties to the arbitration. Under both s 48 of the Arbitration Act and s 24 of the International Arbitration Act of Singapore, the circumstances when a breach of natural justice may be relied on as a ground to set aside an award is more limited, it is only in connection with the making of the award and even then, it must be proved to the court's satisfaction that the rights of any of the parties have been prejudiced.

[54] Even the regime under the Arbitration Act 1996 of the United Kingdom is different. Section 68 allows challenges of awards where the irregularity is of the kind set out in s 68(2)(a)–(i) and even then, the irregularity must be one 'which the Court considers has caused or will cause substantial injustice to the applicant'.

[55] Contrast this with our s 37(1)(b)(ii) read with s 37(2)(b), an allegation

of a breach of natural justice may be raised even where the breach occurred during the arbitral proceedings itself; the applicant is not confined, unlike in Singapore, to the breach having occurred in connection with the making of the award.

[56] Consequently, it would be inappropriate to have applied the case authorities from Singapore on how discretion under our s 37 is to be exercised as we are obviously not comparing laws which are in pari materia.

[57] This distinction in the drafting of our s 37 is deliberate and the court's duty is to give effect to the law as passed. We have been shown by learned counsel for the appellant that the position under s 37 is actually similar to r 34(2)(b)(ii) read with r 34(6)(b)(i) and (6)(b)(ii) of Schedule 1 to the Arbitration Act 1996 of New Zealand 1996. Having examined those provisions, we agree. It therefore would be more appropriate, if we are to look elsewhere for guidance on the interpretation and application of s 37, it would be to the case authorities from New Zealand and to the reports of the United Nations Commission on International Trade Law (UNCITRAL) together with the digest of case law on the model law prepared by UNCITRAL's Secretariat. The digest is a compilation of case laws from various model law jurisdictions prepared by UNCITRAL, as part of the 'preparation of the tools necessary for a thorough understanding of the instruments it develops and for their uniform interpretation'. The digest is intended to 'assist in the dissemination of information on the model law and further promote its adoption as well as its uniform interpretation. In addition, the digest is meant to help judges, arbitrators, practitioners, academics and government officials use more efficiently the case law relating to the model law' — see Official Records of the General Assembly, 59th Session, Supplement No 17 (A/59/17) paras 87–91.

[58] In this respect, the cases of *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452, and *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] 3 NZLR 644, the latter, a decision of the New Zealand Court of Appeal, are relevant. *Trustees of Rotoaira Forest Trust* is a case concerning an application to set aside an award determining the stumpage percentage payable by the Crown to the trust pursuant to a forestry lease. The principal complaint there was that the arbitrators had introduced fresh ideas into their award without giving the parties the opportunity to address them; the fresh ideas involved the formula to be adopted in assessing the stumpage amount. Fisher J summarised at p 463 the principles that should be observed when considering such an application as follows:

(a) arbitrators must observe the requirements of natural justice and treat each party equally;

(b) the detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise;

(c) as a minimum each party must be given a full opportunity to present its case;

(d) in the absence of express or implied provisions to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to be present throughout the hearing; and that each party be given opportunity to present evidence and argument in support of its own case, test its opponent's case in cross-examination, and rebut adverse evidence and argument;

(e) in the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond;

(f) the last principle extends to the arbitrator's own opinions and ideas if these were not reasonably foreseeable as potential corollaries of those opinions and ideas which were expressly traversed during the hearing;

(g) on the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other. It will usually be no cause for surprise that arbitrators make their own assessments of evidentiary weight or credibility, pick and choose between different aspects of an expert's evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented, and exercise reasonable latitude in drawing their own conclusions from the material presented;

(h) nor is an arbitrator under any general obligation to disclose what he has in mind to decide so that the parties may have further opportunity of criticising his mental processes before he finally commits himself;

(i) it follows from these principles that when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result; and

(j) once it is shown that there was significant surprise it will usually be reasonable to assume procedural prejudice in the absence of indications to the contrary.

[59] The above principles were then applied to the challenge on an objective test; and having done so, Fisher J found that the 'cause of action turns upon the reasonableness of the trust's assumption that the model adopted by the arbitrators was not on the table as a possible outcome. It has not been suggested that the award model fell outside the contractual and pleadings framework in which the arbitration took place — cl 18 of the lease, the reference, the points of claim and the points of defence. The trust's case must therefore be confined to the manner in which the arbitration hearing itself was conducted'. After going through the record of the arbitral proceedings, Fisher J concluded that there was 'ample opportunity for the trust to advance additional evidence and argument on the subject of land expectation values. That it refrained from doing so must be regarded as its responsibility'.

[60] The Court of Appeal, New Zealand's decision in *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* was an arbitration on dispute of rent review. The arbitrator was an experienced valuer. Two claims of breach of natural justice were made against the arbitrator. First, that prior to the hearings, the arbitrator inspected the premises with a witness of Beca in attendance. Second, the arbitrator had failed to disclose a business relationship between a Beca witness; this was discovered after the award had been rendered. Kyburn claimed that it would not have agreed to the appointment had it been aware of this relationship. The High Court's finding on the first ground, that it amounted to a breach because there was a risk that adverse comments about the building might have been made was affirmed on appeal. As for the second ground, the High Court had rejected the ground that it was a new cause of action raised out of time; this was also confirmed.

[61] In *Kyburn Investments Ltd*, despite finding the existence of breach, the High Court refused to set aside the award after evaluating the nature and impact of the particular breach against the policy background of both encouraging arbitral finality and protecting the parties against seriously flawed arbitrations. The Court of Appeal did not find the High Court to be in error in exercising its discretion not to set aside the award. Although the arbitrator's breach of the rules of natural justice was a significant breach, the risk that something was said to the arbitrator by Beca's witness was said to 'not have any material effect on the outcome of the rent review arbitration. The award correctly recorded the well-established legal principles to be followed, the arbitrator inspected comparable premises, and the award was based principally on the arbitrator's evaluation of the expert valuation evidence adduced. It was an unexceptional rent review award'.

[62] At paras 41–47, the Court of Appeal discussed how the discretion under article 34 (comparable to our s 37) is to be exercised:

[41] A finding of a breach of the rules of natural justice does not mean that the

arbitral award must be set aside. As already noted, the power of the court to set aside an award under art 34 is discretionary and will not be exercised automatically in every case.

[42] The discretion enables the court to evaluate the nature and impact of the particular breach in deciding whether the award should be set aside, the policy of encouraging arbitral finality will dissuade a court from exercising discretion when the breach is relatively immaterial or was not likely to have affected the outcome. Similarly, an award may not be· set aside when the costs and delays involved are disproportionate to the amount in dispute.

[43] On the other hand, where the breach is significant and might have affected the outcome courts are inclined to set aside the award. In some cases, the significance of the breach may be so great that the setting aside of the award will be practically automatic, regardless of the effect on the outcome of the award. Examples include *TNT Bulkships Ltd,* where the arbitrator had circumvented the legal procedures that were agreed to be applied to the arbitration. The judge found this to be a substantial and complete misunderstanding by the arbitrator of his role in the arbitration, as opposed to a casual breach or occasional error which may not have necessitated court intervention.

[44] The approach of the High Court to the exercise of the discretion is conveniently summarised by *Williams and Kawharu on Arbitration*:

> Use of the discretion enables the High Court to balance arbitral finality with the need to protect parties against seriously flawed arbitrations. To determine the consequence of an error, the court may take into account causation and materiality considerations. Thus, even if a ground for setting aside is present, the court may consider the magnitude of the defect and the extent to which it had or might have had an impact on the outcome of the dispute, and particularly, whether the tribunal might have reached a different conclusion had it adopted the correct approach.

[63] Because s 37 vests the court with a wide discretion on whether to set aside an award, we agree with the learned JC that the decision to set aside an award is not an automatic outcome of a finding that there has been a breach of the rules of natural justice. The court will still have to evaluate whether discretion should be exercised in the applicant's favour. In considering whether discretion should be exercised, there should be an evaluation of relevant factors such as those identified in *Kyburn Investments Ltd v Beca Corporate Holdings Ltd*, amongst which would be to consider the seriousness, magnitude or materiality of the breach, its nature and its impact, whether the breach would have any effect on the outcome of the arbitration; leaving room for 'casual breach or occasional error'. Costs of rehearing and delay in raising the complaint are further relevant factors to be taken into account in that evaluation. This exercise is different from undertaking an exercise to show prejudice, which may be in several respects, including monetary rights.

[64] There is however, no question of there being an onus cast on the applicant to establish these factors. In *Kyburn Investments Ltd*, the Court of Appeal further opined that there was no such onus:

> [45] As to whether there is an onus on a party complaining of a breach of natural justice to make out that its consequences are sufficiently material to warrant setting aside an award, we agree with the further submissions for Kyburn that the existence of such an onus is not supported by the history and policy of the legislation or case law. *It is clear from the Model Law and the Law Commission report preceding the Act that it was intended to confer a wide discretion dependent on the nature of the breach and its impact rather than imposing an onus.*
>
> [46] Cases in jurisdiction applying the Model law do not support the existence of an onus. Instead, the materiality of the breach and the possible effect on the outcome are treated as relevant factors.
>
> [47] We agree with the Hong Kong Court of First Instance and Court of Appeal in *Pacific China* to the extent that there is the ordinary onus or burden on the applicant to make out his or her case that the award should be set aside. Contrary to the Hong Kong Courts, however, we would not elevate this to a legal requirement to show the outcome would be different had the breach not occurred. No single factor is decisive or necessary for an award to be set aside. Sometimes, the breach will be sufficiently serious as to speak for itself. In other cases, the Court will need to consider the materiality of the breach and evaluate whether it was likely to have affected the outcome. Other factors may be relevant to the exercise of discretion, such as the likely costs of holding a rehearing. (Emphasis added.)

[65] Applying thus these legal principles to the instant appeal, the issue is whether the learned JC could be said to have been evaluating the relevant factors that will properly weigh in any consideration to set aside an award. In our respectful view, we cannot find that to be the case. We would be straining to justify and uphold that exercise of discretion for several reasons.

[66] In the first place, the learned JC has unequivocally categorised the object of his examination and evaluation as one for the purpose of establishing whether the appellant had suffered any actual or real prejudice. His whole exercise as explained at para 52 of the grounds, show His Lordship satisfying himself that the appellant had not suffered any prejudice for the several reasons that were set out in that para 52. His Lordship had embarked on the exercise after establishing what he considered were the relevant principles or tests to be adopted in this regard; and this is where His Lordship had seen fit to adopt and apply the approach of the Courts in Singapore, which approach we have already pointed out earlier ought not to be adopted here slavishly as the statutory provisions of Singapore's equivalent ss 48 or 24 as the case may be, in this respect, are quite different.

[67] As mentioned earlier, we agree with the findings of the learned JC that

there have been two instances of breach of the rules of natural justice by the learned arbitrator. The two pieces of evidence being:

(a) 'weather induced erratic stress and loading' subjected the structural members of the Stinger Hitch to fatigue; and

(b) 'continuous excessive loads accentuated by severe weather during the week, resulted in the cracking of the plate'.

[68] There is no appeal or cross-appeal on this finding that these pieces of evidence are extraneous, which we find to be correct in any event. The learned arbitrator's own statement at para 407, that his own theorising has not been investigated by either party fortifies this finding.

[69] His Lordship found both pieces of evidence to be 'extraneous evidence' as neither the appellant nor the respondent had adduced evidence on them. These two pieces of evidence were in fact, raised by the arbitrator himself, and then relied on by him to reach his decision on the issue of causation before making the award. All this was quite clearly done without giving the parties any opportunity to test the extraneous evidence, adduce admissible evidence to rebut such evidence and/or present written and/or oral submission in respect of such evidence.

[70] The two pieces of evidence were based on the learned arbitrator's personal expertise, experience and/or knowledge. Although the arbitrator has the power to draw from his own knowledge and expertise, and this is statutorily provided by s 21(3)(b), this power must be read together with the arbitrator's overarching duty to act fairly and in accordance with the rules of natural justice as set out in s 20 which reads as follows:

> 20 Equal treatment of parties
>
> The parties shall be treated with equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.

[71] This point was picked up by the learned JC, who at para 44 of his judgment, opined that the learned arbitrator's duty under s 20 must be adhered to in two stages, during the arbitral proceedings within the meaning of s 37(2)(b)(i) and during the deliberation and making of the award as envisaged under s 37(2)(b)(ii). We regard this duty to act fairly as a continuous duty, consistent with the universal concept of fair play that permeates and prevails throughout the whole dispute resolution process. To protect the sanctity and finality of the award and for sound business and commercial practice, the arbitrator's duty to act fairly must necessarily endure throughout the whole arbitral process. Arbitrations invariably, resolve disputes on rights and liabilities of parties, albeit of commercial or contractual origins. Consequently, there is

always a duty imposed on the arbitrator to act fairly and to always afford parties reasonable opportunity to present their case or arguments, including present supporting or rebuttal evidence on any live issue in the arbitration, whether such issue or matter was brought up by the parties or by the arbitrator himself.

[72] As decided in *Trustees of Rotoaira Forest Trust*, unless there is express or implied agreement to the contrary, the arbitrator is also 'precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond'. Extraneous evidence extends to any evidence or, even argument which the arbitrator brought up himself. We do not see any claim or argument that the arbitrator in this case was appointed for or known for his 'special expertise'. Unless there was express agreement to the contrary, the arbitrator was obliged to invite the parties to deal or respond to his two pieces of extraneous evidence and line of reasoning on the issue of causation.

[73] At the very minimum, each party must be given a full opportunity to deal with this evidence or argument which has now crossed the arbitrator's mind, whether by submitting or presenting rebuttal or supporting evidence, as the case may be. In fact, the parties must be allowed to test or investigate the two pieces of extraneous evidence, be it through the experts or through metallurgical or scientific testing of the failed member/cracked plate of the stinger hitch. Unless the cause is so obvious or logical that it could not have been missed or reasoned, this minimum must be respected and adhered to for the very reason that it is a rule of natural justice. This cause(s) was not at all reasonably foreseeable as a potential corollary to 'opinions and ideas which were expressly traversed during the hearing'.

[74] Here, a closer look at the respondent's claim and the responses of the appellant is necessary in order to appreciate the appellant's concerns. Although there were other issues concerning the non-renewal of the BG, the focus is on the damaged stinger hitch which the respondent wanted repaired. It was how the stinger hitch was damaged that was of critical concern as the determination of the cause of damage would answer the question of who was to bear the responsibility and thereby the costs of repair.

[75] The appellant claimed that the respondent's pleaded and argued claim which the respondent ran throughout the arbitration, from its amended points of claim to the evidence, including the expert evidence led, and finally to the submissions made, was always about the respondent's entitlement to treat the vessel as still under hire and not redelivered under the CPA. The reason for this was because the stinger hitch and equipment of the vessel was redelivered, damaged. The respondent's claim was always about the damaged stinger hitch, that it was the appellant who had damaged the stinger hitch and equipment of

A the vessel when operating the vessel and/or handling the vessel and/or stinger hitch. That allegation of damage is premised on negligence, that the appellant had negligently damaged the stinger hitch.

B **[76]** This is reflected in paras 23–29, 33–42 of part D of the amended points of claim, captioned 'Damage to the Vessel's stinger hitch, its tools, equipment, machine and etc'.

C **[77]** At para 23, the respondent claimed that it was informed that there was damage to the vessel, particularly to its stinger hitch and that structural alterations and modifications had been done by the appellant to the stinger hitch area and that there was damaged and/or missing equipment, machine, tool and inventories from the vessel. At para 24, the respondent claimed that pursuant to cl 4 of the CPA, the vessel 'is to remain on hire during any period D of these alterations or reinstatement. Also pursuant to cl 41 of the contract, the charterers shall pay the owners usage of any consumables, medicines, tools, communication and equipment which are lost and/or damaged at cost plus 15%. As at 12 March 2013, the respondent had failed and/or neglected and/or refused to initiate the relevant repair and/or reinstatement of the vessel and/or E to replace the lost and/or damaged equipment on the vessel'.

[78] At para 33, the respondent set out that on 15 January 2013, it was advised by the appellant 'that there was damage to the stinger hitch and on 9 January 2013, the pipeline was abandoned and the 40M stinger had F de-attached from the stinger hitch ...'. At para 36 of the amended points of claim, the respondent alleged that the appellant objected to the respondent's contentions in its letter dated 23 January 2013, and 'admitted that although the sea condition was rough at times during all material times, they were of the opinion that the sea condition was within the design operating condition of the G stinger and well below weather operating condition of the stinger and well below weather conditions which would necessitate abandonment and alleged that as the Vessel has previously undergone some repair works in Batam, the repairs were not properly accrued out and that the damage is either a pre-existing condition or propagated from the earlier damage ...'.

H

[79] The appellant claimed that there was a crack at the base plate and stinger hitch slot which it suspected, existed earlier. This was denied by the respondent who claimed, inter alia, that

I (a) the appellant had inspected and accepted the conditions of the vessel on a 'as is where is basis' — para 37;

(b) the stinger hitch 'is in operational mode but exposed to bad weather, it is obvious that movement of the stinger will create severe load and stress on the stinger hinges' — para 37(iii);

(c) the 'good condition of the stinger must be subjected to several limitations including weather condition where the Claimant's representative had gave several reminders to the respondent's offshore Construction Superintendent of such advice which were ignored by the respondent' — para 37(iv); and

(d) the 'damage to the vessel and its equipment were caused by the respondent's lackadaisical attitude to the sensitivity of the vessel's equipment' — para 37(vii).

[80] At para 38, the respondent states the damage and the structural alteration caused by the appellant were directly linked to the incident on 9 January 2013:

> 38. The Claimant avers ... the *damage to the vessel's stinger hitch and equipment were caused by the negligent act of the respondent in operating and handling the Vessel and its equipment during bad weather* which was not suitable for the operation of stinger hitch and/or equipment of the Vessel and failure to exercise proper judgment with prudent and practice good seamanship given the weather forecast before and *on the day of incident, ie on 9.1.2013* which has been noticeably starting to deteriorate. (Emphasis added.)

[81] This allegation of negligence was followed up at para 41 of the amended points of claim:

> 41. Due to the repair arrangement done by the respondent to the stinger hitch in view of the *damage to the stinger hitch caused by the respondent's negligent act in operating and/or handling the vessel's stinger hitch*, this has caused the structural alteration and modification to the vessel as this stinger hitch is now permanent to the hull of the vessel when the initial designs and operation of the stinger hitch is detachable in nature. In addition the A&R winch wire was cut and equipment were damaged, eg Yokohama Fenders, motors, davit and etc. (Emphasis added.)

[82] These specific allegations were then responded to by the appellant — see para 25 of the re-amended defence and counterclaim; and by the respondent in its amended reply to the defence and amended defence to counterclaim at para 15(f) and (g).

[83] We agree with the submissions of learned counsel for the appellant that points of claim, responses/defences and replies are to parties in an arbitration as pleadings are to the litigants in a court of law. Unless the parties have agreed to the contrary, those 'pleadings' define the disputes between the parties and the extent of jurisdiction and submission to the jurisdiction of the arbitrator — see s 25 of Act 646. Section 25 is modeled after article 23 of the model law with amendments adopted in 2006. The *Travaux Preparatoires* of UNCITRAL Model Law and the Analytical Commentary on Draft Text of a Model Law on

International Commercial Arbitration (Report of the Secretary General, UN Commission on International Trade Law, 18th Session, A/CN.9/264), commenting on article 23 states at pp 51–52:

> 1. Paragraph (1) deals with the preparation of the case in writing. The first sentence sets forth those elements of the initial pleadings which are essential for defining the dispute on which the Arbitral Tribunal is to give a decision. it is then up to the Arbitral Tribunal to require further statements or explanations, under its general power of article 19(2). The required contents of the initial statement of claim and of the respondent's reply may be regarded as so basic and necessary as to conform with all established arbitration systems and rules. It is in this spirit that the provision does not go into particulars such as to whom the statements must be addressed.

[84] The Report of the Working Group on International Contracts Practices (UN Commission on International Trade Law, 5th Session, NCN.9/233) and the UNCITRAL 2012 Digest of Case Law on the Model Law (pp 109–110), state views and terms to similar effect. Case laws have also abided by that interpretation and understanding — see *Perwira Bintang Holdings Sdn Bhd v Kerajaan Malaysia* [2014] 11 MLJ 561 (affirmed by the Court of Appeal in [2015] 6 MLJ 126); *Ahmani Sdn Bhd v Petronas Penapisan (Melaka) Sdn Bhd; PT Prima International Development v Kempinski Hotel SA & Other Appeals* [2012] 4 SLR 98.

[85] Not only do these pleadings define the dispute(s) that are referred to arbitration, more importantly, the arbitrator takes his mandate and authority from those pleadings insofar as what is required for his determination. The arbitrator cannot exceed those terms of reference or limits of submission which have been demarcated by consensual agreement between the parties. Otherwise, these breaches may become the basis of setting aside of awards under other provisions of s 37(1)(a) of Act 646.

[86] The arbitrator does not set those limits of jurisdiction, the arbitrator's jurisdiction is defined for him by the parties. In this case, not only do the pleadings precisely demarcate and define the dispute, the terms were also agreed to at a preliminary meeting on 11 February 2014 between the arbitrator and the parties.

[87] One of the three central issues submitted to arbitration was the cause of damage. In that regard, the respondent in its amended points of claim with legal counsel, had chosen to frame the cause as one grounded in negligence, with specific contentions of how the negligent acts were committed. The conduct of the parties and the manner in which the arbitration was conducted further reflect and consistently kept to those agreed defined limits. In fact, in their submissions on legal issues, the respondent defined its complaint and its claim in even clearer terms, that it was requiring the arbitrator to determine

'Whether there was any negligence on the part of the respondent in relation to the incident on 9 January 2013'. The respondent had further pleaded that the structural alteration caused by the appellant were directly linked to the incident on 9 January 2013. This submission invited response submissions on the same from the appellant, where the appellant denied the same and required the respondent to prove its claims, that the appellant's negligent act in operating and/or handling the stinger hitch had caused the structural alteration and modification to the vessel.

[88] The presentation of oral and documentary evidence, including expert evidence, and the submissions made by both parties on the legal issues and subsequently on the evidence presented, all adhered to these agreed defined disputes that were clarified in the submissions on legal issues. The closing submissions and statements again kept to the pleaded case; and rightly so in view of the role and importance of pleadings in arbitration.

[89] At the arbitration and as reflected by the parts of the award already identified earlier (see also paras 351, 355, 394, 396 and 400 of the award) and in the appellant's submissions, the respondent failed to establish its claim in causation, that the appellant's negligent act in operating and/or handling the stinger hitch had caused the structural alteration and modification to the vessel. The respondent's claim only came together after the arbitrator made his observations and findings on the two pieces of extraneous evidence. Although the arbitrator is entitled to make his findings on the cause of damage as pleaded or defined by the disputing parties, he is not at liberty and neither is he permitted to redefine the cause or the particular activity or operation or work, particularly where the parties have already so defined that issue.

[90] Viewed from this objective perspective, it can only reasonably be concluded that these two pieces of extraneous evidence were indeed relevant and material to the question of causation of the damage to the stinger hitch. This question of causation had so vexed the parties that it was at the very heart of the dispute between them. These two pieces of extraneous evidence supposedly answered the question of causation, as it led the learned arbitrator to readily conclude that 'on a balance of probabilities, ... the damage is sustained due to continuing operations of the Stinger and the Vessel in severe weather conditions by the plaintiff, prior to and on the day the damage was discovered'. Yet, these two pieces of critical and material evidence were never indicated to the parties, until the award was rendered, by which time it was too late. The case that was run by the parties from the moment of definition to the time of award; had been redefined by the arbitrator without giving the parties an opportunity to present their responses. This redefinition brought a new difference to the dispute which also renders the award liable to be set aside under s 37(1)(a) — see *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd*

A [2015] 6 MLJ 126; [2015] 1 CLJ 617.

[91] Without these two pieces of extraneous evidence and thereby this conclusion, the arbitrator could not have been in the position to make the orders for monetary compensation in the form of payment for the extended period of charter hire and the costs of repair and reinstatement that were mentioned at the outset of this judgment — the sum of USD3,023,269.52 for the outstanding charter hire payments, and the sum of RM502,141.47 towards repair and reinstatement of the vessel, reimbursable items and BG, together with interest. These two instances of breach of the rules of natural justice, viewed objectively can only reasonably be said to have had a huge impact on the effect of the outcome of the arbitration.

[92] Again, without these two pieces of evidence which were never put to the parties, the arbitration would also have reached a different conclusion. At that point in his deliberations, inasmuch as the arbitrator had rejected the appellant's defences, that the stinger hitch was already damaged earlier or had a hidden latent damage and the respondent had thereby discharged its obligations of delivering the vessel in a seaworthy condition, the arbitrator had also rejected the respondent's claim that the appellant was negligent in causing the damage to the stinger hitch.

[93] Hence, up to this point, there was nothing that the arbitrator could pin blame and accountability for the damage. While the appellant may have been in management and control of the vessel and the stinger hitch at the material time, and that the appellant had effected structural alteration to the vessel, it still did not explain or prove causation or the allegations of negligence as pleaded by the respondent, which the arbitrator had already rejected.

[94] Confronted with the two pieces of critical evidence, the arbitrator was obliged to revert to the parties for directions, clarifications or even further evidence or submissions. When he failed to do that, he obviously was in breach of the rules of natural justice. Such breaches were neither technical, casual nor occasional but were of 'significant surprise' that it is 'reasonable to assume procedural prejudice in the absence of indications to the contrary'. As we have seen, the magnitude of the two breaches had real and substantial impact on the outcome of the arbitration and the eventual award that was rendered. The cause of the damage was pivotal to the whole claim, whether for the extended hire or for the costs of repair *simpliciter*. Such breaches by the arbitrator are plainly in conflict with the public policy of Malaysia.

[95] An award made in such circumstances is consequently liable to be set aside. It would be wholly untenable to refrain from doing so because of the minimalist judicial intervention approach thus far adopted by the court;

minimalist does not equal no intervention at all. Neither does it mean that arbitral awards are any less final and binding or that parties are no longer autonomous. On the contrary, s 8 of Act 646 requires intervention where it has been so prescribed and in the appropriate cases. This is an appropriate case for judicial intervention. To resist intervention and not exercise discretion in the circumstances of this appeal would be to deny the course of justice, a position which is never advocated under the UNCITRAL Model Law regime.

[96] Under these circumstances, while the learned JC was correct when he found that there were extraneous evidence taken into account by the arbitrator for which there were violations of ss 20 and 37 of Act 646, His Lordship was in error when he applied the wrong principles and failed to exercise discretion to set aside the award. Such demonstrated error in the exercise of discretion requires appellate intervention — see *ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors* [2013] 3 MLJ 35; [2013] 1 LNS 99. As deliberated earlier, it is the whole award which is set aside and not parts of the award.

CONCLUSION

[97] For all the reasons discussed above, we unanimously allow the appeal. The decision of the High Court is set aside with costs. The award is accordingly set aside.

Appeal allowed.

Reported by Ashok Kumar